SUPREME COURT, U. S.

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IN THE

# Supreme Court of the United States

**October Term, 1968.**

No. 773.

JOSEPH A. F. VALENTI,

*Appellant,*

*v.*

NELSON A. ROCKEFELLER, Governor of the State of New York, and JOHN P. LOMENZO, Secretary of State of the State of New York,

*Respondents.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

## PETITION FOR REHEARING.

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### Preliminary Statement.

On January 20, 1969, this court granted the motion of the appellees to affirm the judgment of dismissal rendered below. Appellant had filed his jurisdictional statement and appendix on November 25, 1968, and the motion to affirm was made on December 19, 1968. No briefs were ever filed on behalf of any of the parties.

So summary a dismissal of the first case ever to reach this court seeking construction of the elective rights granted the people under the Seventeenth Amendment strongly implies failure on the part of appellant's advocate to present a proper case. For this is no mean or ordinary federal question. Primarily it is a question

that spans fifty years of our National life. It is a question that raises the fundamental values upon which we have built all our political institutions.

But, most importantly, the question pertains to the United States Senate, at once the most powerful, and most influential political body on earth; a political body which frequently decides closely contested political questions, a body limited to one hundred members, a body whose voting record demonstrates again and again the critical nature of just one vote; a body, accordingly, whose members the people should have a constitutional right to elect.

It is for these reasons that appellant files this petition for rehearing. For the majority opinion below, despite the prestige and credit of its author, is wrong,—wrong in its tactics, wrong in its emphasis, wrong in its conclusions—and most of all, a personal wrong to those men who sat in the Senate and brought about—from within—the great reform that is the Seventeenth Amendment.

## Grounds for Rehearing.

### (a.)

### The institutional integrity of the federal government requires reversal.

Institutional integrity is a meaningless phrase unless specifics put substance in it. The specifics in this case are not meaningless, however. There are two particulars in which the judgment below violates institutional integrity: First, the United States Senate itself, after twenty years of debate and a climax of unprecedented political drama, decided the principle that state governments should not have exclusive and unfettered discretion over the conduct of Senate elections; Second: The United States Senate itself, after fifty years of deliberation, changed its own constituency from the state governmental institutions (the governor and the state legislature), to the people of each state directly. What do these Senate changes mean if a semantic ambiguity in the Seventeenth Amendment can return to the governor and a state legislature: First, the power to postpone the sovereignty of the people for almost half the Senatorial term; and Second: The power to make an appointed Senator responsive to the constituency of the Governor and the State Legislature, for his appointive term, rather than to the people at large for his election?

Ultimately, however, the policy question is even more basic. How can the Senate (or the people, for that matter), make this court, which is part of the institution that is the federal government, enforce judicially those political decisions which the Senate made over half a century ago? There is no method of enforcement, save the integrity of the members of the one institution to the other. And this integrity, in this case, must be exercised among members who never knew nor met the other.

(1.) *The Political Evolution of the Senate's Decision*

The first resolution providing for a change from State Legislature election to the popular election of senators was presented on January 14, 1850, by Senator Clemens of Alabama. See Sen. Document No. 666, p. 3 (1912). Debate and committee study of these and similar measures did not begin, however, until 1873. *Idem.*, p. 4.

The political positions polarized within the Senate from then on. There were three (3) groups: Southern and southwestern Democrats who favored the reform but also wanted to use it as a vehicle through which to repeal Article I, Section 4, which gave the federal government power to regulate state election of members of Congress (Reconstruction had made the Southerners wary of "force bills," a legislative device whereby the federal Congress overrode decisions of the political institutions of the southern states. They wanted to remove federal power to enact "force bills" in order to protect Southern election machinery); Eastern Republicans who opposed the change and wished to keep the *status quo* (the reasons here are more obscure, but the charges of the Southerners were that it was easier for Republican business interests to bribe a Governor or a State Legislature, than to bribe the entire state population. Sen. Borah of Idaho outlined these abuses when he introduced the resolution. 46 Cong. Rec., pp. 1105-1106 [19 Jan. 1911]); Midwestern and western Populists—most Republican, but some Democrats, who advocated the reform on grounds of democratic principles. Because of this three-way split the Southerners held the balance of power, and they delayed the progress of the Seventeenth Amendment until the "southern version" was enacted.

The Southern version came from Representative Henry St. George Tucker of Virginia in 1892 and *No Other Resolution* ever had a chance of getting the necessary two-thirds of each house of the Congress. So it is well here to recall the words of this court's most senior member in a recent concurring opinion:

> "Professor Fairman's 'history' relies very heavily on what was *not* said in the State Legislatures that passed the Fourteenth Amendment. Instead of relying on this kind of negative pregnant, my legislative experience has convinced me that it is far wiser to rely on what *was* said, and, most importantly, said by the men who actually sponsored the Amendment in the Congress. I know from my years in the United States Senate, that it is to men like Congressman Bingham, who steered the Amendment through the House, and Senator Howard who introduced it in the Senate, that members of Congress look when they seek the real meaning of what is being offered. And they vote for or against a bill based on what the sponsors of that bill and those who oppose it tell them it means." *Duncan v. Louisiana,* U. S. , 20 L. Ed. 491 at p. 505 (1968).

Tucker's southern credentials were impeccable. He was a constitutional lawyer of the first rank, a strict constructionist in the nineteenth century tradition, and sensitive in the extreme to the uses of constitutional

language. He drafted the Seventeenth Amendment to the Constitution as closely as possible to words and intendments already set out in that document:

(See opposite page.) ☞

| | SOURCE | DRAFT |
|---|---|---|
| HOUSE -- | Article I, section 2<br><br>The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures. | Paragraph I<br><br>The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures. |
| SENATE -- | Article I, section 3<br><br>The Senate of the United States shall be composed of two Senators from each state, chosen by the Legislature thereof, for six years: And each Senator shall have one vote. | Amendment XVII, paragraph 1. |
| CONGRESS -- | Article I, section 4<br><br>The Times, Places and Manner of holding elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof, but the Congress may at any time by law make or alter such regulations except as to the place of choosing Senators. | Paragraph II.<br><br>The times, places and manner of holding elections for Senators shall be as prescribed in each state by the Legislature thereof. |

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The deliberation and debate lasted twenty years. The three groups slowly changed in character. The Populists and Southerners grew politically stronger; the eastern Republicans weaker. It was a political contest for power all the way. Control of the Senate was at stake..

Tucker's draft, Senate Joint Resolution No. 134, and House Joint Resolution No. 39 are identical. House Joint Resolution No. 39 became the Seventeenth Amendment.

In 1911 during debate on Senate Joint Resolution No. 134, Senator Nelson of Minnesota stated:

> "The joint resolution reported by the Senator from Idaho and now under consideration is an exact copy of a joint resolution to amend the Constitution reported by Representative Tucker of Virginia, in the 52nd Congress on the 16th day of February, 1892. It is exactly identical with that resolution. Mr. Tucker, in his report, unlike the Senator from Idaho in his report, was candid enough *to state what the entire purpose of the joint resolution was.*" 46 Cong. Rec. (pt. 3), p. 2940. (Italics added.)

* * *

The Committee reports in respect to Tucker's draft, Borah's Joint Resolution No. 134, and House Joint Resolution No. 39, are contained in a Xeroxed supplement filed contemporaneously with this petition for rehearing. Reading them, and the corresponding proceedings in the Congressional Record, is all that is necessary to refute the observation of Judge Lumbard in the majority opinion that Tucker's was an "isolated statement,"[1] or a "bit of legislative history."[2] What is more, such a reading supplies conclusive proof that the Congress in 1912 was

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[1]Valenti Statement as to Jurisdiction, Appendix A, p. A27.

[2]Iden. at p. A28.

"cognizant of his [Tucker's] opinion." Judge Lumbard's statement:

> "Little weight can be given to Representative Tucker's 1892 interpretation of his vacancy provision since there is no indication that the Congress which proposed the Seventeenth Amendment was even cognizant of his opinion."[3]

is incredible in view of the contents of the Congressional Record, Senator Nelson's remarks, and Senator Rayner's rebuttal. (Senator Rayner was the southern member of the three-man special Senate Committee that reported out Joint Resolution No. 134 to the Senate floor. And Rayner acknowledged his purpose was to repeal Article I, Section 4, as Tucker's report had recommended. 46 Cong. Rec. 2941.)

It is all the more incredible when Tucker himself is studied. Representative Tucker was the son of John Randolph Tucker, related to Governor Randolph of Virginia, whose participation in the debates at the federal convention in Philadelphia in 1787 led to the Constitution itself. He was the grandson of Henry St. George Tucker, a president of the Court of Appeals of Virginia. His father was professor of Constitutional Law at Washington and Lee, and a Doctor of Laws. Representative Tucker himself taught at Washington and Lee as Professor of Constitutional Law, and his two volume work on the Constitution of the United States (Callaghan and Co. 1899) stood as a prime authority for years.[4] In that work, he states, in regard to the Seventeenth Amendment:

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[3]Valenti Statement as to Jurisdiction, App. A, p. A28.

[4]Petitioner does not offer these facts to side with an Aristocratic Elite. The point is that the southern contingent in the late nineteenth and early twentieth centuries believed in an aristocratic elite and followed such persons from deep respect. Accordingly, Tucker's influence among them was prodigious.

> "It is hardly proper in a work devoted to consideration of the Constitution as it is to discuss the propriety of proposed amendments until they shall have been finally acted upon. But it may be remarked that the proposed amendment indicates a drift of public sentiment in favor of a direct relation of the Senator to the people of the state, rather than to the legislative organization of the state, for often a majority of the voters in a state would select a senator different from the one a majority of the legislature might choose." At page 406.

He was the *author* of the Seventeenth Amendment; his was the *only* opinion that mattered to the sponsoring group of Senators, and, in the political context of 1892-1912 they held the balance of political power in the Senate and in the House.

It is ignorance to brush aside Representative Tucker's report as an isolated bit of legislative history, when Tucker dedicated his life to the study of Constitutional Law, and his political career to the reform of the Senate. And it is a travesty on institutional integrity, and on Tucker's ultimate victory, to let that majority opinion stand as it has.

Tucker's version limited "temporary appointments" in the Seventeenth Amendment's vacancy provisions to a year or less, and his victory ought not to be deprecated with so casual a reference.

The political climax of the effort to reform the Senate occurred when Senator Bristow moved in the first session of the 62nd Congress (but only three [3] months after Borah had moved the Joint Resolution) to amend Tucker's draft, by deleting its second paragraph. 47 Cong. Rec. 1205. Senator Bristow explained his entire amendment a week later on the Senate floor. 47 Cong. Rec. 1482-83. The vote came on June 12, 1911. The Bristow

amendment passed the Senate 45-44 with the Vice-President breaking the tie. 47 Cong. Rec. 1923.

Of course, Borah's Joint Resolution No. 134 died in the House of Representatives, until a joint conference could work it out. Again, the Southerners defeated it because the Bristow amendment had deprived them of a repeal of Article I, Section 4. However, Congressman Rucker of Missouri prevailed upon the southern contingent in the House to accept the Senate's version and to yield the effort to repeal Section 4 of Article I. In 1912, southern insistence on the "all or nothing" draft of Representative Tucker yielded to the good sense and persuasion of Congressman Rucker, and the measure finally passed Congress.

What the Congress had decided then, was that, as a matter of principle, the states should not have broad and powerful discretion over the conduct of Senate elections. Yet the majority opinion below proceeds upon exactly the opposite principle.

With so dramatic a climax, and so prolonged a political struggle, the Legislative history behind the Seventeenth Amendment in the Senate is a fascinating study in miniature of American history during Reconstruction, and the ensuing Populist Movement. Since the amendment pertains to the Senate, and since the Congress grappled with it for so long, institutional integrity requires that Congressional deliberations be a *preferred* source of constitutional interpretation.

Yet for reasons incomprehensible to appellant, the court below sought out tables of state statutes to "aid" their judgment, and dabbled with Congressional materials in a totally superficial and shallow manner.

The point is simply this. From what Justice Black said in *Duncan,* and from any experience with legislative bodies, two principles of interpretation emerge:

1) What is important is what *is said*, not what is *not said.*

2) What the sponsors say a bill means, other members accept.

Tucker's draft stayed in the legislative crucible twenty years—longer than most members have sat on this court—and it held the political spotlight for a great deal of that time. Could anyone who voted in 1912 *not have known* what Tucker, the original sponsor and author meant by his vacancy paragraph? Although the political debate did not focus on vacancies in particular, the focus itself was on what Tucker had proposed. How is it possible for a federal court to conclude, in view of such Legislative history, that Tucker's interpretation should be given "little weight"? And, finally—and most galling, how is it possible, more than fifty years after the States' righters themselves have yielded the principle for a federal court to interpret the Seventeenth Amendment as conferring broad discretion on the State government institutions in respect to Senate vacancy elections? How long? How long shall it be before that empty issue dies? How long before the sovereignty of the people prevails, and the state political institutions depart? Where has the sense of political values gone when a federal court can resurrect so dead an issue?

(2.) *The Effect of the Political Decisions on Interpretation of the Amendment*

The Seventeenth Amendment now reads without Tucker's second paragraph. To understand it, Article I, Section 4, must be read as paragraph 2. It is clear then that

Article I, Section 4, does not confer discretion in respect to vacancy elections, but only in respect to regular Senate elections. Vacancy elections in Tucker's draft, and in the Seventeenth Amendment, received separate and special treatment, as they originally had in the Constitution as first written.

Also the phrase "as the Legislature may direct" (the "bloated tag-end phrase" which Judge Frankel describes in his dissent), loses much force. In Tucker's draft it related back to his paragraph No. 2 as a logical tie-in phrase. But Congress repealed his paragraph No. 2. So a good argument exists that the Bristow amendment impliedly repealed that tag-end phrase as well. Yet the majority opinion below has founded its whole judgment on those few words, and has erected tables of hopelessly confused state statutes as verification for the existence of a broad state discretion in the amendment.

Petitioner says not so. The political decisions of the Senate—regardless of whether we concur—bind the federal courts and all federal institutions. And most emphatically should this be so when the Senate has decided an issue about itself. And the duty of all co-ordinate federal institutions is to implement and preserve the integrity of those decisions. They deserve enforcement in the most liberal interpretation which a court can afford. The implied repeal of broad state discretion, overwhelmingly indicated by the adoption of the Bristow amendment, bars resort to state statutory interpretation as a reliable guide to the meaning of the Seventeenth Amendment.

(b.)

**The canons of constitutional construction require reversal.**

In respect to interpretive canons of constitutional construction, appellant can add little of academic value beyond what Judge Frankel has already supplied in his dissent.[5] What neither opinion did, however, was to present state statutes in respect to the filling of vacancies in the House of Representatives. The command of the Seventeenth Amendment in respect to writs of election derived from the text of Article I, Section 2, paragraph 4. Again, Tucker's draft and all committee reports provide incontrovertible proof of that.

What is most relevant then, as to what the Seventeenth Amendment vacancy writ mandate means, are—if we are to pursue the logic of Judges Lumbard and Henderson to its penultimate conclusions—the state statutes in respect to House vacancies. And for contemporaneous—or as nearly so as possible—interpretation, we should look to ALL the original thirteen states, not, as the majority did, to Arizona, New Mexico, Utah and Wisconsin.[6]

Table I on the next page follows this pursuit of state legislation, and adds Vermont, Alabama, and Maine for territorial nicety. The common denominator throughout, without exception, is that the constitutional mandate requires a special election to fill the vacancy. The use of minimum periods of twenty (20), thirty (30) and fifty (50) days characterizes the legislation. We must contrast this with the more than two and one-half years de-

[5]Statement as to Jurisdiction—Appendix A, pp. A67-A69.

[6]Statement as to Jurisdiction—Appendix A, p. A21.

lay in respect to the Senate vacancy election herein.[7] And this is state legislative interpretation of exactly the same language, derived from an identical source.

The logic of the majority opinion is to refer to those very few states whose House vacancy statutes leave timing in an ambiguous limbo, and to ignore the great majority of states whose House vacancy statutes enjoin a prompt issuance of the election writ, in order to conclude that prompt special elections are unnecessary. (For if a few say promptness is not necessary, it cannot be constitutionally impermissible.) Then, as to Senate vacancies, the majority cites the large number of states who might have laws as broad as New York's, and concludes that what the majority of states have done is what is constitutionally permissible. This is adopting a different interpretive canon to construe identical language. For if the canon is what most states have done, then what most have done in respect to House vacancies conflicts with what most have done in respect to Senate vacancies notwithstanding the same mandate, and the very same language applies. And that conflict should be admitted, argued, and resolved by judgment. But if the canon is what a select few states have done, then because as few have ordered Senate elections within a year, as have allowed postponements of House vacancy elections, there is a similar conflict. Again, the language is identical.

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[7]It is interesting to note in this connection, that Senator Goodell, who replaced Senator Kennedy, was a Representative in Congress. The seat he vacated in Congress (New York 38th District) on September 9, 1968, was filled by election by the people at the general election on November 5, 1968.

What the majority has done is to adopt the canon that produces the desired result—hardly a commendable practice for court opinions.

(See opposite page.) ☞

TABLE I

I. STATE STATUTES AS TO VACANCIES IN THE HOUSE OF REPRESENTATIVES

| STATE | EARLIEST DATE | Vacancy Election at the Discretion of Governor | Special Election within a Year or at Governor's call | Vacancy Filled at Next Annual Election | Vacancy Filled at Next Biennial Election |
|---|---|---|---|---|---|
| Alabama<br>Title 17 , Section 215 | | | X<br>(Minimum wait of 30 days) | | |
| Connecticut<br>Gen. Stat. 9-212 | | | X | | |
| Delaware<br>Title 15, Ch. 73, Section 7301 | 1852 | | X | | |
| Georgia<br>Ga. Code Ann. 34-804 | | | X<br>(Minimum wait of 30 days) | | |
| Maine<br>Title 21, Section 1532 | 1833 | | X | | |
| Massachusetts<br>Ann. Laws - Title 54, Sec. 140 | 1833 | | | | |
| Maryland<br>Ann. Code - Art. 33, Sec. 158 (b) | | | X<br>(Not less than 20 days) | | |

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| STATE | EARLIEST DATE | Vacancy Election at the Discretion of Governor | Special Election within a Year or at Governor's Call | Vacancy Filled at Next Annual Election | Vacancy Filled at Next Biennial Election |
|---|---|---|---|---|---|
| New Hampshire<br>Rev. Stat. Ann. 63-13 | 1848 | | X<br>(Forthwith) | | |
| New Jersey<br>Stat. Ann. -Tit. 19, Sec. 27.4 - 27 10.1 | | | X<br>(Fifty (50) day minimum) | X | |
| New York<br>Election Law-Sec. 143, 278(4), and 297 | 1896 | | X | | |
| North Carolina<br>Gen. Stat. 163-13 | 1901 | | X | | |
| Pennsylvania<br>Pa. Stat. Ann. -Tit. 25, Sec. 2777 | | | X<br>(Call in 10 days, minimum 30 day wait) | | |
| Rhode Island<br>Gen. Laws 17-3-9 | 1901 | | X<br>(forthwith) | | |
| South Carolina (No Statute) | | | | | |
| Virginia - Code , Sec. 24-6 | 1919 | | X | | |
| Vermont<br>Vt. Stat. Ann., Tit. 17, Sec. 1701 | 1794 | | X | | |

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The House vacancy provision has been the subject of Congressional legislation as well as state enactments. Much weight should attach to an act of Congress. The statute Congress passed reads as follows:

> Chapter XI, Section 4—February, 1872
>
> "That if, upon a trial, there shall be a failure to elect a Representative or Delegate in Congress in any State, District, or Territory, upon the day hereby fixed and established for such election or if, after any such election, a vacancy shall occur in any such State, District, or Territory, from death, resignation, or otherwise, *an election shall be held to fill any vacancy caused by such failure, resignation, death, or otherwise* at such time as is or may be provided by law for filling vacancies in the State or Territory in which the same may occur." (Italics added.)
>
> 17 Statutes-at-Large—p. 29 (1872)

The revisers have codified and edited the at-large version into what now is Title 2 of the U. S. Code, Section 8.

> "8. *Vacancies*—The time for holding elections in any state, district, or territory for a representative or delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation or incapacity of a person elected, many be prescribed by the laws of the several States and Territories respectively."

The reviser's edition, it is submitted, unwisely omits that highly significant phrase, italicized in the at-large text, "an election shall be held * * *"

The ambiguity that persists throughout the Congressional enactment above, the state laws enacted and referred to, and in the Constitution itself is simply this:

*The mandate is in both cases:*

> "When vacancies happen, * * * the executive authority shall issue writs of election to fill such vacancies,"

*but the mandate is subject to Article I, Section 4, in both cases:*

> "4. The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each state by the Legislature thereof. * * *"

The mandate contemplates contemporaneous action, urgency, prompt response. The discretion as to timing, the discretion as to "temporary appointments," subverts the mandate. Yet there comes a point when an election delayed becomes an election denied.

It is the responsibility of the judicial branch of government to fix that point in time where delay becomes denial. To do so, the courts must further the spirit and intent of the amendment and of the political values it expresses—values which this court, in many recent decisions, has elevated to the highest order of constitutional rights. *Reynolds v. Sims*; *Baker v. Carr*; *Westberry v. Saunders*; *Williams v. Rhodes,* are landmarks, and need no citation.

The Seventeenth Amendment was a political decision. It expressed a value-judgment that election of senators by the people was preferable to election by state legislators, or appointments by state executives. The court below has held that, notwithstanding this value-judgment at the heart of the amendment, the principles of federalism—as expounded in the style of the late Mr. Justice Frankfurter—precludes judicial interference with asserted States' rights. Appellant's complaint is that this decision is not *Judgment,* not *Interpretation,* but espousal of a contradictory political principle.

## Conclusion.

For the foregoing reasons, appellant respectfully prays that this court grant a rehearing, and that, upon further consideration, the judgment of the United States District Court for the Western District of New York be reversed.

## Certificate of Counsel.

I, JOHN MANNING REGAN, do hereby certify for the appellant above-named, that the petition for rehearing submitted herewith is presented in good faith and not for delay.

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